



December 9, 2002

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

RE: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Dear Ms. Dortch:

On behalf of the 2,600 member companies of the Mortgage Bankers Association of America ("MBA")¹, we would like to offer our views on the Federal Communications Commission's ("FCC") notice of proposed rulemaking ("NPRM" or "Proposal") to amend its rules implementing the Telephone Consumer Protection Act of 1991 ("TCPA"). We appreciate the opportunity to offer our views. In sum, MBA does not support the development of a national do-not-call (DNC) list due to the significant impact on the mortgage industry's ability to market its mortgage products and the cost and burden of complying with such a database and its related requirements. However, if compelled to move forward, MBA urges the FCC to consider a "face-to-face" exemption.

I. Introduction

The real estate industry continues to strengthen the weak economy. Despite the drop in stock prices and general lag in the economy, the real estate industry has continued to finance new home sales and provide significant cost savings through refinances. With interest rates at historic lows, homeowners are refinancing their mortgages, freeing up more money for spending and investment in other sectors of the economy. Excessive government regulation that limits the ability of a healthy sector of the economy to gain

¹ MBA is a trade association representing approximately 2,600 members involved in all aspects of real estate finance. Our members include small and large institutions, national and regional lenders, mortgage brokers, mortgage conduits, and service providers. MBA encompasses residential mortgage lenders, both single-family and multifamily, and commercial mortgage lenders.

new customers and provide home ownership and refinancing opportunities could threaten the economy as a whole. Subjecting the real estate finance industry to a national DNC list would do exactly that; it would limit consumer information and choice, slowing economic activity in this sector. Therefore, we do not support the development of a national DNC list.

The protections afforded by the current TCPA rule are generally well designed and carefully measured to balance consumer concerns and business needs. Under the current scheme, a consumer who does not wish to speak to a telemarketer can simply state that fact and will be taken off that company's list for any future calls. The rule is sufficiently tailored so as not to impede the marketing activities of all businesses, only those the borrower has identified.

Our members generally support the current rule and believe its restrictions to be appropriate in protecting the privacy of all consumers. The mortgage lending industry has very strict standards in place to ensure that our telemarketing operations are in full compliance with current legal requirements. The mortgage industry is concerned with efforts to dramatically restrict legitimate telemarketing efforts. As a result, we would like to comment on: (1) the development of a national DNC list; (2) specific proposals to amend the company-specific DNC lists requirements; and (3) the need for consistent rules from both the FTC and FCC.

II. National Do-Not-Call List

Under the proposal, the FCC seeks comments on whether to act on the authority granted by section 227(c)(3) of the TCPA and provide for the "establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." 47 U.S.C. 227(c)(3) & (4). The direct cost to develop and support the database would be borne by telemarketers because the TCPA prohibits any residential telephone subscriber from being charged for inclusion on or removal from the database. 47 U.S.C. 227(c)(3)(E). Of course, the ultimate cost would fall on consumers when companies are forced to pass-on the costs of the database in the form of higher prices. Consumers who purchase from telemarketers will pay for those consumers who have placed themselves on the list.

In 1992, the FCC considered developing a national database, but declined to do so because of concerns over costs and the ability to maintain a database that is "reasonably accurate in form." The same concerns that existed in 1992 exist today. The cost of implementing such a requirement would be prohibitive for many businesses and would impose significantly greater compliance requirements without a reasonable

guaranty that the list is accurate.² Concerns also persist, as they did in 1992, that a national database could be used by unscrupulous marketers to obtain information on the consumer, including addresses and unlisted telephone numbers. These significant issues surrounding a national database mandates that the FCC tread with caution as it deliberates the creation of a national DNC list. In light of these concerns and the relative success of the company-specific DNC lists, MBA does not currently support the development of a national DNC list.

A. The Impact on Small Businesses/Mortgage Originators

The greatest impact of a national DNC list on MBA's members will be on mortgage brokers and individual loan officers. Mortgage brokers are predominately sole proprietorships, small businesses, or small branches of broker networks. Loan officers operate much like independent contractors even if employed by a large, national lender. Loan officers traditionally work out of local branches and are often responsible for paying for their own advertising and certain computer equipment. It will be very difficult for small businesses and individuals to comply with a national DNC list because telemarketing provides them with a very efficient way to contact consumers. Many small lenders use referrals from customers, not large lists, to attract new business. Such referrals are thus difficult to "scrub" against a national DNC registry. Individual loan officers and brokers (as opposed to centralized sales facilities) are less able to afford the cost of accessing a national database, to absorb the cost of associated technology, or to comply with multiple layers of state and federal regulations.

Brokers and loan officers are critical to the mortgage industry because they make the initial contact with the borrower. They establish the business relationship with the consumer and need the communication flexibility to use the telephone to inform borrowers of various products and services. Because mortgages are very customer-specific products, the telephone provides two-way communication that allows loan officers to provide detailed rate-quotes to specific customers after learning the requisite information. A national DNC list, which would hamper this interactive telemarketing option, would have a particularly devastating impact on these originators, as telemarketing presents the most efficient and affordable method of presenting their products. In a highly competitive market such as mortgage banking, the consumer's ability to get information is important and can result in the consumer obtaining the most favorable rate, term and product. Eliminating or drastically reducing an originator's potential client base will restrict the flow of valuable information.

² The NPRM indicates that 20% of all telephone numbers change each year, requiring frequent updates that will presumably increase the cost of the registry for both the administrator of the database and the telemarketer.

B. A National DNC List Is Overly Broad

The development of a national "registry" at this point is unnecessary in light of the effectiveness of current laws. The development of a national registry is simply disproportionate to the stated problem. The desire for consumers to be entirely free from even receiving an initial call is unreasonable and fails to balance competitive interests in commercial free speech and privacy. Moreover, the concept of an "all or nothing" registry, whereby consumers have the option of receiving no-calls or all calls, is an excessive remedy to the issue of unwanted solicitations. Our members traditionally have very few requests to place consumers on DNC lists – a sign that consumers generally welcome mortgage calls. Although consumers have expressed interest in a national DNC list, it is not clear that they understand how a DNC list would severely restrict their access to information about valuable goods and services.

The creation of a massive registry is an undertaking that is expensive and certain to generate a sundry of compliance difficulties. These proposals would require sizeable systems changes, new operational procedures, and high retraining expenditures. As is always the case with the establishment of new systems, the registry will have to advance through long periods of "experimental" runs and troubleshooting to ensure accuracy. Affected industry members will be required to do the same. MBA believes that this is unnecessary. As stated above, the current legal system effectively achieves the FCC's objectives while providing the balance between equally important interests. Rather than enacting new laws, the Commission should concentrate on adequate enforcement of existing rules while ensuring that consumers understand the potent rights they are afforded under current law.

C. National List Fails to Relieve Regulatory Burden

The FCC seeks comments on whether a national DNC list would be less burdensome for telemarketers, who currently must create company-specific DNC lists as well as access external lists required by state law. A proposal that would create a single list and apply uniform standards across the nation for all telemarketers has the potential to reduce the current complex regulatory structure. Unfortunately, such a universal scheme cannot be accomplished today without federal legislation providing for a complete preemption of state law.

While the FCC has the authority today to preempt state law as it relates to interstate telephone solicitations, the TCPA does not grant the FCC authority to preempt state laws that offer more restrictive *intrastate* requirements. Without a complete federal preemption, we contend that a national DNC list and accompanying rule would not reduce the compliance burden of most telemarketers. Such a list would impose additional burdens.

Moreover, a federal preemption may not be advantageous to either interstate or intrastate telemarketers if the federal rules do not incorporate certain exemptions found in various state laws. For example, several state laws provide for an exemption for transactions initiated by telephone, but consummated following a face-to-face meeting.

Also, some state laws partially fund the cost of the database by charging the consumer a fee to be listed. An FCC/TCPA list would presumably prohibit such fees, thus increasing the direct costs to telemarketers – and ultimately consumers. A federal preemption that eliminates these important state-provided exemptions for telemarketers would result in more onerous restraint of trade than exists with the current federal and state structures.

D. Adoption of a Face-to-Face Exemption

Although MBA does not support the development of a national DNC list, to the extent the FCC is compelled to move forward, we respectfully request that it consider providing an exemption for so-called “face-to-face” transactions.

Face-to-face transactions are those in which a telemarketer does not seek to complete a sale or secure payment over the telephone. Rather, the telemarketer uses the call to set up a face-to-face meeting, either at the consumer’s residence, at the telemarketer’s place of business, or other third-party location to finalize the transaction. Most of the information about the goods or services is provided at the meeting, rather than over the phone.

In the case of a mortgage lender, his or her objective is to set up an appointment or to begin a process that is ultimately closed in a face-to-face transaction. This is in contrast to a typical telemarketing transaction, where the telemarketer will attempt to both introduce a product and/or service and close the deal in a single call. It is common in the latter cases for the telemarketer to obtain the consumer’s credit card, social security number or other financial information that will allow the telemarketer to complete the purchase. This approach can be viewed as highly intrusive.

The TCPA authorizes the FCC to provide a face-to-face exemption. The TCPA provides that the FCC shall consider alternatives for “local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits.” 47 U.S.C. § 227(c)(1)(C). Calls to set up a face-to-face meeting are inherently local. Traditional mortgage banking almost always involves a face-to-face meeting due to the complex nature of the transaction, the consumer’s desire for advice on mortgage products, and the paper intensive application process. While the company *funding or purchasing* the loan may be a large national lender, it is the *local* loan officer or third party broker who makes the initial local telephone contact with the borrower.

The legislative history of the TCPA is replete with discussion of the local calls exemption. One colloquy clarified that a local office of a national photographer would fit within the definition of a local call. This is because such a studio must function within a community (and thus could alienate potential customers by calling too often) and because such calls are made for face-to-face purposes; a consumer cannot have his or her picture taken without an in-person meeting. Similarly, a consumer does not usually close a mortgage without a face-to-face meeting. The current rules provide more than adequate protection for local calls, particularly those that set up a face-to-face transaction.

Failure to provide such an exemption would not only affect the financial success of many mortgage companies, but would also curb the flow of valuable information to consumers. A telephone call from a mortgage lender is particularly effective because it helps focus the consumer's attention on improving his or her financial situation. Print advertising does not have the same effect because of the lack of two-way communication. We are convinced that the imposition of a national DNC list without a face-to-face exemption will deprive consumers of refinancing opportunities.

III. Miscellaneous Proposals Regarding the Company-Specific Do-Not-Call List Requirements

A. Website or Toll-free Access to Company-Specific DNC List

The FCC requests comments on enhancing the existing company-specific DNC list by requiring that companies provide a toll-free number and/or a website that consumers can access to register their name on the company's DNC list. Mortgage origination is an inherently local business. As a result, there is no need for a broker or lender to have a website because consumers have direct contact with the company. Moreover, there is no need for a toll-free number because the people who call are located nearby.

MBA is concerned that brokers and other small originators will not have the financial resources to design and maintain an interactive website and provide the necessary security for sensitive financial/non-public information that would surely flow from this proposal. Moreover, requiring local companies to invest in a toll-free number would be wasteful. Mandating such requirements would impose unreasonable technology costs on small, local companies.

B. Confirmation of the Borrower's DNC Request

Comments are sought on whether companies should be required to respond affirmatively to or otherwise confirm a consumer's request to be placed on a company-specific DNC list so that consumers may verify that their requests have been processed.

Mortgage lenders and other legitimate telemarketers make every attempt to comply with the current FCC rules. If the consumer requests not to be contacted, the lender will honor that request. Of course, no company can be free of error. A confirmation from the lender that the request has been processed is excessive. Presumably, a confirmation of this nature would be given by mail, increasing postage, printing and resource costs. In the end, it is likely that many of the confirmations will be discarded by the consumer as "junk mail."

To the extent that the consumer is concerned about violations of the DNC requirement, consumers should note to whom the DNC request has been made, and seek enforcement of the TCPA if the company calls thereafter. The FCC and state authorities have been given strong enforcement powers under the TCPA and they should use them when consumers are wronged.

C. 10-year Life of a DNC Request

The FCC asks if the rule that companies honor DNC requests for ten years is reasonable. In light of the data provided in the NPRM that one-fifth of all numbers change each year, a more reasonable time period is four to five years.

IV. Coordination with the FTC Rule

MBA is a unique association because some of our members are within the FCC's jurisdiction, while others are within both the FCC's and the FTC's jurisdictions. Differences in the regulatory standards create confusion and an unlevel competitive playing field. We, therefore, urge the FCC to coordinate with the FTC to ensure uniform rules on telemarketing. To the extent that both agencies move toward a national DNC list, we ask that efforts be made to ensure that only one national database is created. Failure to provide uniform rules and a single database will unnecessarily add complexity to the good faith compliance by our members and will surely result in a greater number of mistakes by well-meaning telemarketers.

V. Conclusion

MBA appreciates the opportunity to comment on this important telemarketing proposal. It is clear that the FCC is taking steps to ensure a thorough review of the effectiveness and fairness of the current rule. We ask, however, that prior to issuing a final rule, the FCC re-issue a notice of proposed rulemaking with a more specific proposal. While the current proposal provides for some insight into the FCC's possible changes, it does not provide an actual framework that can be evaluated properly.

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Page 8 of 8

If you would like to discuss our proposal in greater detail, please do not hesitate to contact me or Vicki Vidal at 202/557-2861.

Sincerely,

/s/

Kurt Pfotenhauer
Senior Vice President, Government Affairs